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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

QUESTION PRESENTED

Whether 5 U.S.C. 5334(b), which entitles a promoted or transferred government employee to an automatic two-step increase in pay, is applicable to promotions and transfers from positions in the prevailing-rate Wage System (WS) to positions in the General Schedule (GS).

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*The original plaintiffs in this action were Joseph J. Clark, Frank D'Aversa, Nicholas J. Libretto, Nicholas J. Proto, Carlo Scialpi, and Albert Wolfus. Clark and Proto are now deceased; they are represented herein by their widows, Margaret Devine Clark and Annette Kurtzman Proto.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims on the issue of liability (App. A, *infra*, 1a-8a) is reported at 599 F.2d 411. The order of the Court of Claims determining the amount of respondents' recovery (App. B, *infra*, 9a-14a) is unreported.

JURISDICTION

The opinion of the Court of Claims on the issue of liability was rendered on May 16, 1979. A timely petition for rehearing was denied on September 28, 1979 (App. C, *infra*, 15a-16a). The judgment of the Court of Claims awarding monetary recovery to respondents was entered on August 8, 1980 (App. B, *infra*, 9a). On October 28, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255. See *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

STATUTES AND REGULATIONS ~~PROVISIONS~~ INVOLVED

The pertinent statutory and regulatory provisions are set forth in Appendix D, *infra*, 17a-22a.

STATEMENT

1. This case involves two of the principal pay systems for federal employees—the General Schedule (GS), 5 U.S.C. (& Supp. III) 5331 *et seq.*, and the prevailing-rate Wage System (WS), 5 U.S.C. (& Supp. III) 5341 *et seq.*

Except as otherwise provided, "all civilian positions and employees in or under an agency" fall within the General Schedule. 5 U.S.C. 5102(b); see also 5 U.S.C. 5331. The General Schedule covers most federal white-collar positions. See R. Vaughn, *Principles of Civil Service Law* § 6.2(a), at 6–4 (1976). There are approximately 1.4 million full-time employees in the General Schedule. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1979*, at 279, Table No. 466 (1979) ("1979 Statistical Abstract").

The General Schedule comprises 18 grades. See 5 U.S.C. 5104, 5332. A grade

> includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to—
>
> (A) level of difficulty and responsibility; and
>
> (B) level of qualification requirements of the work; to warrant their inclusion within one range of rates of basic pay in the General Schedule.

5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5106(b). In turn, each grade is divided into rates of pay, or steps. See 5 U.S.C. 5332. GS salaries are determined pursuant to the principles of comparability set forth in the Federal Pay Comparability Act of 1970. See 5 U.S.C. 5301. The salary level for a given GS grade and step is uniform nationwide. See 5 U.S.C. 5332.

In contrast to the General Schedule, the Wage System is applicable to federal blue-collar workers. See 5 U.S.C. 5342(a)(2)(A); C. Goodman, *Handbook on Public Personnel Law* 147 (1978); Vaughn, *supra*, § 6.2(b), at 6–17. By definition, WS positions are excluded from the General Schedule. See 5 U.S.C. 5102(c) (7), 5331, 5342(1)(2)(A). The wage System encompasses approximately 462,000 full-time employees. See 1979 Statistical Abstract, *supra*, at 279, Table No.

466. Rates of pay under the Wage System are based on a wage survey of prevailing rates for comparable work in the local wage area. See 5 U.S.C. 5341, 5343. Thus, unlike the General Schedule, WS rates are determined for each locality and vary across the country.[1]

2. Respondents are six present and former employees of the Supervisor of Shipbuilding, Conversion and Repair, Department of the Navy. Between July 1973 and October 1974, they were promoted from positions in the prevailing-rate Wage System to positions under the General Schedule.

Incident to these changes in position, respondents' salaries were calculated pursuant to the provisions of the General Schedule. However, two inconsistent methodologies were used in making those calculations. With respect to respondent Libretto, the Civil Service Commission (CSC) "highest previous rate" rule was applied. That rule provides that

> when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate.

5 C.F.R. 531.203(c) (App. D, *infra*, 20a).[2] Respondent Libretto's highest previous rate fell between two steps of his new GS grade and, in accordance with general

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[1] The history of the Wage System is discussed in Vaughn, *supra*, § 6.2(b), at 6-18 to 6-20.

[2] In 1978, the Civil Service Commission was succeeded by the Office of Personnel Management (OPM). See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S. (Supp. III) 1101 *et seq.*

Navy policy,[3] he was given the higher salary level. In this way, respondent Libretto received a salary increase upon his appointment to the General Schedule.

The GS salaries of the other respondents were determined by first applying the provision of Subchapter S8-3d of the CSC Federal Personnel Manual System (FPM), *Federal Wage System*, Supplement 532-1 (Inst. 8, Jan. 16, 1973) (App. D, *infra*, 21a-22a), which stated that an employee promoted to a Wage System position is entitled to be paid at the lowest scheduled rate that exceeds his existing rate of pay by no less than a one-step increment of the category from which he was promoted.[4] Once this adjustment had been made, the new GS salaries of these respondents were computed by applying the "highest previous rate" rule of 5 C.F.R. 531.203(c) to the adjusted rates of pay. Thus, each of these respondents was awarded two salary increases for a single promotion. This method of computation was in error, because Subchapter S8-3d and the "highest previous rate" rule of 5 C.F.R. 531.203(c) are not applicable to the same personnel action; Subchapter S8-3d covers promotions to a WS position, while the "highest previous rate" rule pertains to promotions from a WS position to a GS position.

In November 1974, respondent Libretto filed an appeal with the Navy, claiming that he was entitled to

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[3] By regulation, the Navy has elected to place employees at the higher of the two GS rates in all cases where it serves the interest of the government. See Civilian Manpower Management Instruction 531.S2 (June 26, 1974).

[4] This section was recently amended to provide for an increase of 4% of the representative rate of the previous grade instead of a one-step increase. See Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1, Subchapter S8-3d (Inst. 17, Apr. 14, 1980). This amendment does not affect the question presented herein.

the higher GS salary received by the other respondents. The Navy rejected this contention on the ground that respondent Libretto's GS salary had been properly determined. The Navy also concluded that the salaries of the other respondents were erroneous, and accordingly it notified them that their salaries would be reduced to the correct levels based on the formula utilized in the case of respondent Libretto (App. A, *infra*, 2a).

Respondents unsuccessfully pursued their administrative remedies, and on January 29, 1976, they commenced this suit in the Court of Claims under the Tucker Act (28 U.S.C. 1491) and the Back Pay Act (5 U.S.C. 5596). Respondents contended that they were entitled to a two-step increase pursuant to 5 U.S.C. 5334(b), which reads in pertinent part (App. D, *infra*, 19a):

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

Respondents sought an award of back pay and a correction of their employment records in accordance with Section 5334(b).[5]

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[5]On its face, 5 U.S.C. 5334(b) entitles the employee to a GS salary that "exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Thus, the Court of Claims clearly misunderstood the operation of Section 5334(b) when it stated (App. A, *infra*, 1a n.1) that the statutory increase was measured by two steps of the new grade to which the employee was promoted rather than of the former grade from which he was promoted.

On cross-motions for summary judgment, the Court of Claims held (App. A, *infra*, 1a-8a) that respondents were entitled to a two-step salary increase under 5 U.S.C. 5334(b). Focusing on the word "promoted," the court found that Section 5334(b) is applicable to promotions from the Wage System to the General Schedule. In addition, relying on the fact that a promotion within the GS system gives rise to a two-step increase, and believing that "[a]n employee promoted within the WS receives a comparable benefit; even an employee promoted 'criss-cross' from GS to WS receives the benefit" (App. A, *infra*, 7a), the court concluded that Congress intended a like rule to apply to promotions from the Wage System to the General Schedule (*id.* at 8a). Accordingly, the court invalidated, as inconsistent with the statute, the OPM regulation that construed Section 5334(b) to be limited to transfers or promotions *within* the General Schedule:

> The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

5 C.F.R. 531.204(a)(1) (App. D, *infra*, 20a).

Based on this decision, the case was remanded to the Trial Division of the Court of Claims for a determination of the total payment due each respondent. The government's motion for rehearing on the issue of liability was denied (App. C, *infra*, 15a-16a). Thereafter, the parties stipulated to the amount of respondents' recovery, and final judgment was entered on August 8, 1980 (App. B, *infra*, 9a-14a).

REASONS FOR GRANTING THE PETITION

The Court of Claims has held in this case that 5 U.S.C. 5334(b) requires a two-step salary increase for all employees promoted from the prevailing-rate Wage System to the General Schedule. In so holding, the court ignored the plain language of the statute and disregarded the contrary interpretation that the agencies charged with administering Section 5334(b) have consistently followed since the time of enactment. Because the Court of Claims' ruling on this important issue involving the pay of federal employees threatens to impose substantial monetary liability on the United States without congressional authorization, review by this Court is warranted. In light of the manifest error of the decision below, the Court may wish to consider summary reversal of the judgment of the Court of Claims.

1. This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 5. See also, *e.g.*, *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979).

Here, the language of the statute clearly indicates that a two-step salary increase is not required for promotions from the Wage System to the General Schedule. By its terms, 5 U.S.C. 5334(a) provides that, in the circumstances of this case, "[t]he rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission]

in conformity with this subchapter and chapter 51 of this title * * *" (App. D, *infra*, 18a).[6] Pursuant to this authority and 5 U.S.C. 5338, the Civil Service Commission promulgated the "highest previous rate" rule, 5 C.F.R. 531.203(c), to determine the new rate of pay "when an employee is reemployed, transferred, reassigned, promoted, or demoted" in the General Schedule (App. D, *infra*, 20a). Under this provision, the Navy was authorized to pay each respondent "any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate" (*ibid.*). Thus, the General Schedule salary of each respondent was properly computed to be the higher of the two GS rates between which his highest previous rate fell.[7]

Contrary to the analysis of the Court of Claims, 5 U.S.C. 5334(b) does not compel a different result. Section 5334(b) provides (App. D, *infra*, 19a) that "[a]n employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Under 5 U.S.C. 5102(a)(5) and 5 U.S.C. 5331(a), the word "grade" is defined to include (App. D, *infra*, 17a) "all classes of positions which * * * are sufficiently equivalent * * * to warrant their inclusion within one range of rates of basic pay *in the*

[6] The Court of Claims agreed (App. A, *infra*, 3a n.4) that 5 U.S.C. 5334(a) is applicable to respondents' promotion from the Wage System to the General Schedule.

[7] Respondents have never challenged the particular calculations made under the "highest previous rate" rule, but rather have contended only that the rule is not applicable in this case at all.

General Schedule" (emphasis added). Accordingly, Section 5334(b) is expressly confined to promotions from one GS position or grade to another, and thus it is inapplicable to promotions, as in the present case, from the Wage System to the General Schedule.[8]

Indeed, this has been the longstanding and consistent interpretation of the statute by the agencies re-

[8]This conclusion is not altered, as the Court of Claims believed (App. A, *infra*, 5a–8a), by the fact that respondents may be said to have been "promoted" from a WS position to a GS position. In pertinent part, a "promotion" is defined to be "a change of an employee, while continuously employed, from * * * [a] lower rate paid under * * * [a non-GS system] to a higher rate within a General Schedule grade." 5 C.F.R. 531.202(h)(2) (App. D, *infra*, 19a–20a). Thus, respondents received a promotion only because application of the "highest previous rate" rule resulted in an increase in their basic rate of pay. However, for purposes of 5 U.S.C. 5334(b), the salient inquiry is not whether an employee received a promotion but whether the promotion occurred within the General Schedule.

In addition, the Court of Claims erred in stating (App. A, *infra*, 7a & n.13) that the government conceded that an employee promoted within the Wage System or from the General Schedule to the Wage System is entitled to an increase "comparable" to the two-step increase provided by Section 5334(b) for an employee promoted within the General Schedule. As the government explained in its cross-motion for summary judgment (page 11) and in its petition for rehearing en banc (pages 4–5), an employee promoted either within the Wage System or from the General Schedule to the Wage System receives a one-step increase pursuant to Subchapter S8-2a(7) and S8-3d of FPM Supplement 532–1 (App. D, *infra*, 20a–22a; see also page 4 note 4, *supra*); an employee who is transferred or reassigned but not promoted within the meaning of Subchapter S8-2a(7) may receive an increase only in accordance with the "highest previous rate" rule of Subchapter S8-3c (App. D, *infra*, 21a). Moreover, these increases are not required by statute, but instead have been established by OPM in the exercise of its discretion under 5 U.S.C. 5343(c)(5). Thus, the court's discussion in this regard reflects a fundamental misunderstanding of the Wage System.

sponsible for its administration. The provision for an automatic salary increase now found in 5 U.S.C. 5334(b) was originally enacted in the Classification Act of 1949, ch. 782, Pub. L. No. 429, Section 802(b), 63 Stat. 969-970, 5 U.S.C. (1952 ed.) 1132(b).[9] In first implementing the Act, the Civil Service Commission promulgated regulations providing that "[a]n employee promoted, repromoted or transferred to a higher grade *between Classification Act positions*, shall receive * * * [the automatic salary increase]." 5 C.F.R. 25.104(a), 15 Fed. Reg. 1236 (1950) (emphasis added). Unless the promotion or transfer occurred within the Classification Act system, it was subject to the "highest previous rate" rule applicable to "an employee who is reemployed, transferred, reassigned, promoted, repromoted, or demoted * * *" from a different pay system to a position under the Classification Act. See 5 C.F.R. 25.103(b), 15 Fed. Reg. 1235 (1950). Since prevailing-rate positions were excluded from the Classification Act (see ch. 782, Pub. L. No. 429, Section 202(7), 63 Stat. 954-955, 5 U.S.C. (1952 ed.) 1082(7)), an employee transferred or promoted from such a position to a Classification Act position was covered by the "highest previous rate" rule and was not entitled to an automatic step increase in salary.

Subsequent revisions to the regulations have consistently adhered to the construction that the step-increase provision is inapplicable to transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position.[10] Likewise, the

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[9] This section initially provided for a one-step salary increase, but it was amended in 1962 to specify a two-step increase. See page 12, *infra*.

[10] See, *e.g.*, 5 C.F.R. 25.104(a), 15 Fed. Reg. 7868 (1950) ("[a]n employee promoted, repromoted or transferred to a higher grade between Classification Act positions or grades");

General Accounting Office, which is authorized to settle and adjust "[a]ll claims and demands whatever * * * against [the Government of the United States]" (31 U.S.C. 71; see also 31 U.S.C. 72), has uniformly recognized that the "highest previous rate" rule, rather than the automatic step-increase provision, governs transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position. See, *e.g.*, 59 Comp. Gen. 209 (1980); 52 Comp. Gen. 695 (1973); unpublished Comp. Gen. opinion B-172706.05 (KM) (Dec. 30, 1975); unpublished Comp. Gen. opinion B-172706 (Apr. 19, 1972).

In disregarding these administrative authorities, the Court of Claims plainly erred by failing to heed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). This principle is particularly apt where, as here, there is a "longstanding and consistent administrative interpretation" (*Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)) that "involves a contemporaneous construction of [the] statute by the [persons] charged with the

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5 C.F.R. 25.104(a), 25 Fed. Reg. 7147 (1960) ("[t]he requirements of Section 802(b) of the [Classification] Act apply in repromotion actions and in transfers involving promotions between Classification Act grades"); 5 C.F.R. 531.204(a)(1), 28 Fed. Reg. 10948 (1963) ("[t]he requirements of Section 802(b) of the [A]ct * * * apply in a transfer involving a promotion between Classification Act grades"); 5 C.F.R. 531.204(a), 33 Fed. Reg. 12450 (1968) ("[t]he requirements of Section 5334(b) of title 5, United States Code, apply only (1) to a transfer from one General Schedule position to a higher General Schedule position, and (2) to a promotion from one General Schedule grade to a higher General Schedule grade").

responsibility of setting its machinery in motion" (*Andrus* v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 10, quoting *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933)).

Moreover, judicial deference to the agency's interpretation of a statute is especially appropriate "when Congress has refused to alter the administrative construction." *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), quoting *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381. "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). And, in examining the statute and its administrative construction, "the views of subsequent Congresses * * * are entitled to significant weight." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980).

As originally enacted, the Classification Act required a one-step salary increase for promoted employees (see page 10 and note 9, *supra*). In 1962, the statute was amended to provide for a two-step increase. See Pub. L. No. 87-793, Section 604(a), 76 Stat. 847-848, 5 U.S.C. (1964 ed.) 1132(b). The congressional hearings preceding this legislation clearly evince the understanding that the automatic step increase was not applicable to employees promoted from a prevailing-rate position to the General Schedule. Thus, as Chairman Dulski stated in opening the hearings, "[t]hese bills would provide a formula for guaranteeing employees *under the Classification Act* a minimum salary increase when promoted *from one*

grade to another. The purpose of this legislation is to require that, when *a classified employee is promoted*, he will receive an increase in compensation that is more realistic and more commensurate with the increased responsibilities he must assume in the higher grade." *Hearings on Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted Before The House Comm. on Post Office and Civil Service*, 87th Cong., 1st Sess. 2 (1961) (emphasis added).[11] Representative Lesinski, the sponsor of one of the bills, explained that "[u]nder present law, *a classified employee who is promoted or transferred to a higher grade*, in most cases, receives a pay increase equal to at least a one-step increase in the grade from which promoted. * * * The simple objective of [the bill] is to make more realistic and more meaningful *promotions from one grade to a higher grade for employees under the Classification Act*" (*id.* at 3; emphasis added). Similarly, O. Glenn Stahl, testifying on behalf of the Civil Service Commission, emphasized that "[w]e are speaking now only of employees whose positions are subject to the Classification Act. * * * [The bill is] limited to the Classification Act. It has no applicability to jobs not under the Classification Act" (*id.* at 6, 10). In a later discussion, Mr. Stahl again stated that employees excluded from the Classification Act would not benefit from the bill (*id.* at 16, 17), reiterating that "[i]t is only applicable to employees under the Classification Act" (*id.* at 18).

[11] The bills under consideration at the hearings—H.R. 1010, 87th Cong., 1st Sess. (1961), and H.R. 2015, 87th Cong., 1st Sess. (1961)—were indistinguishable in terms of coverage from the provision enacted into law as Section 604(a). See H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. 61 (1962); S. Rep. No. 2120, 87th Cong., 2d Sess. 25 (1962). However, while H.R. 1010, like Section 604(a), called for a two-step increase, H.R. 2015 required that the salary be increased by the difference between the minimum rates of the new grade and the former grade.

In 1972, Congress again considered the pay systems for federal employees when it enacted Pub. L. No. 92-392, 86 Stat. 564, 5 U.S.C. 5341 *et seq.* The purpose of this legislation was to codify and standardize the prevailing-rate system, which had theretofore been governed largely by administrative regulation and practice. See S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971). Comparable to the authority granted by 5 U.S.C. 5334(a) with respect to the General Schedule, the statute authorized the Civil Service Commission to prescribe regulations under the Wage System "governing the administration of pay for individual employees on appointment, transfer, promotion, demotion, and other similar changes in employment status." 5 U.S.C. 5343(c)(5). In adopting this provision, Congress "intended to grant to the Commission the same authority which it now has under 5 United States Code 5334 with respect to employees paid under the General Schedule" (H.R. Rep. No. 92-339, *supra*, at 14). In particular, it was contemplated that "[t]he Commission's regulations [for the Wage System] may cover matters such as * * * application of the highest previous rate rule * * *" (*ibid.*). Thus, Congress expressly approved the "highest previous rate" rule, which the Commission had consistently used for more than 20 years to determine the salary level of an employee transferred or promoted from a prevailing-rate position to a GS position. This specific congressional endorsement of the Commission's practice is completely at odds with the Court of Claims' conclusion that the provision for an automatic two-step increase, rather than the "highest previous rate" rule, was applicable to respondents' promotions from the Wage System to the General Schedule.

In sum, the Court of Claims' construction of 5 U.S.C. 5334(b) is contrary to the unambiguous lan-

guage of the statute, the longstanding and consistent administrative interpretation, and the understanding of Congress.

2. The Court of Claims' decision, if allowed to stand, will impose substantial monetary liability on the United States. Based on the decision below, the General Accounting Office has already received approximately 4300 claims that are conservatively estimated to involve $22 million in back pay.[12] Most of these claims have been submitted by employees of the Navy, the agency involved in this litigation, and GAO expects that more than 10,000 claims will be made once the Court of Claims' decision is fully publicized. Moreover, potential claimants are not limited to employees who were promoted from the Wage System to the General Schedule within the six-year limitations period provided by 31 U.S.C. 71a, but also include employees whose salary during that time was affected by a promotion that occurred more than six years before the claim was filed. And, with respect to all timely claims, the government's liability would extend beyond salary awards to various other items that are based on an employee's rate of pay, such as overtime compensation, differentials for night work or hazardous duty, annuities and lump-sum payments for annual leave, and government contributions to life insurance and retirement funds.[13]

In addition, the decision of the Court of Claims is not confined to former Wage System employees. 5 U.S.C. 5102(c) lists 25 other categories of federal employees that are outside the General Schedule, and therefore these employees, like those in the Wage Sys-

---

[12] The recovery of the six respondents in this case exceeded $36,600.

[13] Indeed, almost 20% of respondents' total recovery in this case consisted of non-salary elements.

tem, have not previously been given the automatic step increase of 5 U.S.C. 5334(b). Under the court's reasoning, however, such employees may now claim the benefits of that provision. Furthermore, the Court of Claims stated (App. A. *infra*, 7a), albeit erroneously (see page 9 note 8, *supra*), that promotions within the Wage System and promotions from the General Schedule to the Wage System also fall within Section 5334(b).

Finally, the United States will be required to make significant continuing expenditures to comply with the Court of Claims' interpretation of 5 U.S.C. 5334(b). In light of the court's construction of that provision, the government is obligated to give an automatic two-step increase to employees who are promoted in the future. And, as the court made clear in invalidating existing OPM regulations (App. A, *infra*, 8a), this obligation rests directly on the statute and cannot be modified by administrative promulgation.[14]

Pursuant to the Tucker Act (28 U.S.C. 1346(a), 1491), all subsequent suits involving salary increases under Section 5334(b) may be brought in the Court of Claims. A conflict among the lower courts therefore is unlikely to develop. Thus, the panel decision in the instant case, which the Court of Claims declined to rehear en banc, represents controlling precedent on the

[14] Apart from the direct monetary liability imposed on the United States, the Court of Claims' decision will also result in a serious administrative burden for the government to process the thousands of claims involved. This burden will be particularly onerous with respect to promotions occurring many years ago that had an effect on payments to employees within the six-year limitations period; in these cases, old (and often inactive) records must be located or, if no longer in existence, reconstructed, and the necessary computations carried forward over several years in accordance with intervening changes in the personnel systems.

issue in the absence of this Court's intervention. Given the manifest error of the ruling below and the substantial and continuing monetary liability imposed on the United States, the decision of the Court of Claims should not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment of the Court of Claims.

Respectfully submitted.

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Solicitor General

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JANUARY 1981

APPENDIX A

In the United States Court of Claims

No. 26-76

(Decided May 16, 1979)

JOSEPH J. CLARK, ET AL.

v.

THE UNITED STATES

Before KUNZIG, BENNETT, AND SMITH, *Judges*.

ON CROSS MOTIONS FOR SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

This civilian pay case of first impression involves the proper salary rate for a person promoted from a Wage System (WS) classification position to a General Schedule (GS) position. Plaintiffs claim they are entitled to a salary rate set at an amount equal to two step-increases.[1] The Government argues that this two

[1] The mechanics of the two step-increase is as follows: If the employee's rate in his old position was equal to a rate in the new position, he would be paid at the rate two steps above the step which was equal to his old rate.

If the employee's rate in his old position fell between two rates in the new position, he would be paid at the rate two steps above the *higher* of the rates that his old rate fell between.

Thus an employee receives a minimum of two steps, but it may be more if his old rate fell between two new rates.

step-increase does not apply to promotions from a WS position to a GS position. We agree with plaintiffs.

The six plaintiffs in this case are or were employed on the staff of the Supervisor of Shipbuilding, Conversion and Repair, Department of the Navy. Between July 1973 and October 1974, all were promoted from various positions under the prevailing rate system (or WS) to positions covered under the GS. Plaintiff LiBretto was employed as a Ship Surveyor, Grade 8, level 4 of the WS, earning $7.92 per hour or $16,473.60 per year. His old salary fell between step 4 ($16,138) and step 5 ($16,627) of the GS-11 scale to which he had been promoted. His salary was set at a GS-11, step 5, the higher of the two rates.

The other five plaintiffs had also been promoted[2] from Ship Surveyor to GS positions. However, they had received the benefits of two step-increases at the time of their respective promotions.

LiBretto, believing he was entitled to a GS-11, step 7 (instead of a GS-11, step 5) filed a complaint. That complaint touched off a Navy investigation into the method of calculating LiBretto's salary and the salaries of others who had been promoted in a similar manner. The Navy determined that it had correctly calculated LiBretto's salary and incorrectly calculated the salaries of the other five plaintiffs. The five then received a salary step downgrading in April 1975. However, any possible withholdings to recoup the alleged overpayments have been deferred pending a request by plaintiffs for a waiver. Plaintiffs' six-man Group Grievance was unsuccessful, and they now have

[2] All six plaintiffs were promoted following application, selection, and appointment under the Department of the Navy Merit Promotion Program.

filed a petition in this court. Defendant counterclaimed for the alleged overpayments.[3]

We hold for plaintiffs.

This case turns on the meaning of 5 U.S.C. § 5334[4] and various regulations contained in 5 C.F.R. Part 531.

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[3] Defendant's counterclaim has been dismissed on its own motion, which was made after oral argument.

[4] Section 5334(a) states in pertinent part:

> (a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Civil Service Commission in conformity with this subchapter and chapter 51 of this title when—
>
> (1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
>
> (2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;
>
> (3) he is demoted to a position in a lower grade;
>
> (4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;
>
> (5) his type of appointment is changed;
>
> (6) his employment status is otherwise changed; or
>
> (7) his position is changed from one grade to another grade.

The Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111, substituted the "Office of Personnel Management" for "Civil Service Commission."

Although the word "promotion" does not expressly appear in 5334(a), it seems clear that it falls within one of the seven categories, as the legislative history of an earlier version of this subsection referred to promotion. *See* H.R. Rep. No. 1264, 81st Cong., 1st Sess., *reprinted in* [1949] U.S. Code Cong. Ser. 2363, 2374-75.

Section 5334(b) states in pertinent part:

> (b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. . . .

Plaintiffs therefore argue that since it is undisputed that they did receive "promotions,"[5] they are entitled to a two step-increase under section 5334(b).

However, the Government points to 5 C.F.R. § 531.204(a),[6] a regulation which purports to limit the above statute (§ 5334(b)) to promotions within the GS. The Government further argues that plaintiffs' salary rate is governed by 5 C.F.R. § 531.203(c), which states that:

> . . . when an employee is reemployed, transferred, reassigned, promoted, or demoted, the

---

[5] Both plaintiffs and defendant have termed these actions promotions. Furthermore, 5 C.F.R. § 531.202(h) states:

> (h) "Promotion" means a change of an employee, while continuously employed, from:
>
> (1) One General Schedule grade to a higher General Schedule grade; or
>
> (2) A lower rate paid under authority other than subchapter III of chapter 53 of title 5, United States Code, to a higher rate within a General Schedule grade.

Clearly, plaintiffs were promoted under the definition of 5 C.F.R. § 531.202(h)(2).

[6] 5 C.F.R. § 531.204(a)(1) reads:

> (1) The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

> agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. . . .

We are, therefore, confronted with:

(1) a *statute* that says "promotions" entitle the employee to two step-increases (5 U.S.C. § 5334(b));

(2) a regulation that puts plaintiffs' situation within the definition of "promotion" (5 C.F.R. § 531.202 (h)(2));

(3) another regulation that says that statutory entitlement of a "promotion" does not apply to plaintiffs' situation (5 C.F.R. § 531.204(a)); and

(4) a regulation that says an agency can pay a "promoted" employee at his existing rate, or, if he falls between two rates, at the higher rate (i.e., no step-increases) (5 C.F.R. § 531.203(c)). The three regulations, apparently contradictory among themselves and with the statute, appear on three consecutive pages in C.F.R. and are all within Part 531, Subpart B of 5 C.F.R.[7]

The Government attempts to argue that, at least to these plaintiffs, the regulations do not conflict.

The old rates of all six plaintiffs fell between two GS-11 steps, and they received the higher of the two rates.[8] Thus, all the plaintiffs *in this case* received

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[7]Just how incredibly confusing the regulations were is certainly obvious since the Government paid five claimants, then changed its mind, then refused to pay another, reneged on the five, counterclaimed for a refund, and finally moved to dismiss on its own counterclaim.

[8]Some plaintiffs had been promoted further prior to the April 1975 salary downgrading, and their current rate was therefore adjusted.

some increase in compensation due to their promotions.

However, this theory of the Government's does not explain why the statutory entitlement to two step-increases for a "promotion" does not apply to plaintiffs since they have received a "promotion" under the definition used by both plaintiffs and defendant. (*See* note 5, *supra.*)

The concept of step-increases for promotions had its origins in section 802 of the Classification Act of 1949, ch. 782, 63 Stat. 954, 969. Section 802(a) of that Act is almost identical to the current 5334(a) (*see* note 4, *supra*). Section 802(b) contains language virtually the same as the present 5334(b), except that the earlier statute only provided for one step-increase.[9] Although this 1949 statute is no clearer than its current version, the House Report[10] leaves little doubt as to what Congress intended:

> Subsection (b) of section 802 provides that any officer or employee who is promoted or transferred to a position in a higher class or grade shall receive basic compensation at the lowest rate of the higher class or grade which is at least one step increase above his existing rate of basic compensation.
>
> * * * * *
>
> At present, a promoted employee receives no immediate increase if he is already receiving a

---

[9]The second step-increase for promotions was added by the Act of October 11, 1962, Pub.L. No. 87-793, 76 Stat. 832, 847-48.

[10]The House Bill was passed in lieu of the Senate Bill, and the Conference Report did not mention section 802. *See* H.Rep. No. 1264, 81st Cong., 1st Sess., *reprinted in* [1949] U.S. Code Cong. Ser. 2363, 2375.

rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates.

In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should concurrently accompany a promotion in duties and responsibilities.

Subsection (b) of section 802 corrects this situation.[11] (emphasis added).

Congress thus intended that a promotion mean additional compensation of at least a certain amount (in 1949 one step; now two steps (*see* note 9, *supra*)). Applying 5 C.F.R. § 531.203(c), as the Government urges, would, in some instances, leave a promoted employee with no additional pay. The Government argues that that is not this case. However, neither plaintiffs, nor a hypothetical employee with no increase at all, would receive under the Government's theory the kind of increase in pay that section 5334(b) requires.

Section 5334(a) authorizes the preparation of "a comprehensive, unified set of rules."[12] An employee promoted within the GS receives the benefit of two step-increases. An employee promoted within the WS receives a comparable benefit; even an employee promoted "criss-cross" from GS to WS receives the benefit.[13] *See* FPM Supplement 532-1, Subchapter S 8,

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[11] *Id.*

[12] *See id.* (purpose of parent subsection in 1949 Act).

[13] The Government concedes this point.

§ 8-3(d); § 8-2(a)(7). But, surprisingly, promotions from WS to GS (the other criss-cross), the Government argues, give the employee no such benefit. We do not agree, however, that Congress meant promotions to include only certain kinds of promotions,[14] nor has defendant cited any statute or case mandating such a mixed result.

Therefore, we hold that 5 U.S.C. § 5334(b) requires that a GS employee who has been promoted from the WS is entitled to two step-increases.[15] Because the regulations (5 C.F.R. § 531.204(a) and 5 C.F.R. § 531.203 (c)) as they pertain to promotions are inconsistent with the statute, they cannot, to that extent, stand. *See Hart* v. *United States*, 218 Ct.Cl. ___, 585 F.2d 1025 (1978); *Farrell Lines, Inc.*, v. *United States*, 204 Ct. Cl. 482, 499 F.2d 587 (1974).

Accordingly, after careful consideration of all the parties' submissions, and oral argument, we grant plaintiffs' motion for summary judgment. Defendant's motion for summary judgment is denied. The case is remanded to our Trial Division for proceedings in accordance with Rule 131(c)(2).

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[14] *See Allstate Insurance Co.* v. *United States*, 213 Ct.Cl. 96, 550 F.2d 629 (1977) (absent an indication to contrary, court assumes Congress intended to convey ordinary meaning of the language it used).

[15] It could be argued that the language in § 5334(b) which refers to pay exceeding by two step-increases the "grade from which he is promoted" implies that the employee must have been at a GS grade to be promoted from. However, the House Report of the 1949 Act, *supra* (an Act which had the same language), used the phrase "above his existing rate of basic compensation." *Id.* This negates any suggestion that Congress may have subtly limited this provision to promotions within the GS.

APPENDIX B

In the United States Court of Claims

No. 26-76

FILED AUG 8 1980

JOSEPH J. CLARK, ET AL.

v.

THE UNITED STATES

ORDER

On May 16, 1979, the court rendered an opinion holding that the plaintiffs were entitled to recover and entering judgment to that effect. The determination of the amount of recovery was reserved pending further proceedings pursuant to Rule 131(c).

On August 5, 1980, the trial judge of this court filed a memorandum report recommending that, in accordance with the opinion of the court and the stipulation of the parties, judgments be entered for the plaintiffs as provided on the attached sheet.

IT IS THEREFORE ORDERED that judgments be and the same are entered for the plaintiffs whose names appear on the attached sheet in the amounts listed and as computed therein.

BY THE COURT

/s/ _____

PHILIP NICHOLS, JR.
Acting Chief Judge

ATTACHMENT TO MEMORANDUM REPORT FOR JUDGEMENT FILED AUGUST 5, 1980

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1. The back salary entitlement for plaintiff, Joseph J. Clark, covers the period August 18, 1974 to and including October 7, 1978, when plaintiff Clark retired. During this period, his gross additional back pay entitlement was $4,112.00. Such amount includes a lump sum leave payment. Such gross additional back pay entitlement is subject to Civil Service Retirement deduction of $287.94, and Federal Employees Group Life Insurance (FEGLI) premiums of $38.70. The United States Government is responsible for contributions on behalf of plaintiff of $287.94 to the Civil Service Retirement Fund, and $19.35 for FEGLI premiums. In addition, plaintiff Clark is entitled to additional retirement annuity payments in the amount of $584.00 for the period through August 30, 1979, and $340.00 as additional survivor annuity through May 30, 1980. Since the date of the court's decision in this case, plaintiff, Joseph J. Clark, died. Accordingly, a motion for substitution, under Rule 66, of his surviving widow, Mrs. Margaret Devine Clark, was filed and allowed by the court. It is stipulated and agreed that plaintiff's entitlement and any additional service benefits for plaintiff, Joseph J. Clark, shall be paid to Mrs. Margaret Devine Clark. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Joseph J. Clark, and against defendant, in the total amount of $5,036.00, with the provision that the sum of $287.94 be paid from said judgment to plaintiff's Civil Service Retirement fund, and the sum of $38.70 be paid to plaintiff's Federal Employees Group Life Insurance fund. A net payment is

to be made to Mrs. Margaret Devine Clark, surviving widow of plaintiff, Joseph J. Clark, in the amount of $4,709.36 for back salary to October 7, 1978, retirement entitlement through August 30, 1979, and additional survivor annuity through May 30, 1980.

2. The gross salary differential for plaintiff, Frank D'Aversa, for the period of his employment from May 26, 1974 to May 17, 1980 is $8,900.80, with an allocation of $622.77 to the Civil Service Retirement fund, and $70.63 to Federal Employees Group Life Insurance premiums. The United States Government is responsible for contribution on behalf of plaintiff of $622.77 to the Civil Service Retirement fund, and $35.32 to FEGLI premiums. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Frank D'Aversa, and against defendant, in the total amount of $8,900.80, with the provision that the sum of $622.77 be paid from said judgment to plaintiff's Civil Service Retirement fund account, and the sum of $70.63 be paid to plaintiff's Federal Employees Group Life Insurance fund. A net payment is to be made to plaintiff, Frank D'Aversa, in the amount of $8,207.40 for back salary entitlement to May 17, 1980.

3. The gross salary differential for plaintiff, Nicholas J. Libretto, for the period of his employment from October 12, 1974 to May 17, 1980, is $8,249.60, with an allocation of $577.64 to plaintiff's Civil Service Retirement fund, and $84.20 to plaintiff's Federal Employees Group Life Insurance fund. In addition, plaintiff is entitled to overtime under the Fair Labor Standards Act for the period of January 1974 through May 17, 1980, in the amount of $1,139.95. The United States Government is responsible for contributions on behalf of plaintiff of $577.64 to the Civil Service Retirement fund, and $42.10 to FEGLI premiums. Judg-

ment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Nicholas J. Libretto, and against defendant, in the total amount of $9,389.55, with the provision that the sum of $577.64 be paid from said judgment to plaintiff's Civil Service Retirement fund, and the sum of $84.20 be paid to plaintiff's Federal Employees Group Life Insurance fund. A net payment is to be made to plaintiff, Nicholas J. Libretto, in the amount of $8,727.71 for back salary entitlement to May 17, 1980.

4. The gross salary differential for plaintiff, Nicholas J. Proto, for the period of his employment from July 2, 1973 to and including June 26, 1979, the date of his death, is $4,498.52, with an allocation of $309.59 to the Civil Service Retirement fund, and $37.39 to Federal Employees Group Life Insurance premiums. In addition, plaintiff Proto, or his successor, is entitled to additional survivor annuity through May 30, 1980 of $263.00. The United States Government is responsible for contributions on behalf of plaintiff of $309.59 to Civil Service Retirement fund, and $18.70 to FEGLI premiums. Since the date of the court's decision in this matter, plaintiff, J. Proto, died. Accordingly, a motion for substitution, under Rule 66, of his surviving widow, Mrs. Annette Kurtzman Proto, was filed and allowed by the court. It is stipulated and agreed that plaintiff's entitlement and any additional service benefits for plaintiff, Nicholas J. Proto, shall be paid to Mrs. Annette Kurtzman Proto. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Nicholas J. Proto, and against defendant, in the total amount of $4,761.52, with the provision that the sum of $309.59 is to be paid to plaintiff's Civil Service Retirement fund, and $37.39 is to be paid to FEGLI premiums. A net payment is to be made to plaintiff, Nicholas J. Proto,

or his successor, in the amount of $4,414.54 for back salary entitlement to June 26, 1979, and survivor annuity through May 30, 1980.

5. The gross salary differential for plaintiff, Carlo Scialpi, for the period of his employment from September 15, 1974 to and including December 30, 1977, the date of his retirement, is $1,884.40, with an allocation of $123.32 to plaintiff's Civil Service Retirement fund, and $22.64 to plaintiff's Federal Employees Group Life Insurance premiums. Such gross salary entitlement includes lump sum leave payments. In addition, plaintiff is entitled to increased retirement benefits through May 30, 1980 of $1,077.00. The United States Government is responsible for contributions on behalf of plaintiff of $123.32 to Civil Service Retirement fund, and $11.32 to FEGLI premiums. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Carlo Scialpi, and against defendant, in the total amount of $2,961.40, with the provision that the sum of $123.32 be paid to plaintiff's Civil Service Retirement fund, and $22.64 is to be paid to plaintiff's FEGLI fund. A net payment is to be paid to plaintiff, Carlo Scialpi, in the amount of $2,815.44 for back salary entitlement to December 30, 1977, and retirement benefits through May 30, 1980.

6. The gross salary differential for plaintiff, Albert Wolfus, for the period of his employment from November 11, 1973 to and including July 1, 1978, the date of his retirement, is $4,184.20, with an allocation of $285.68 to plaintiff's Civil Service Retirement fund, and $34.68 to plaintiff's Federal Employees Group Life Insurance premiums. In addition, plaintiff is entitled to increased retirement benefits through May 30, 1980 in the amount of $1,400,000. The United States Government is responsible for contributions on behalf of plaintiff of $285.68 to Civil Service Retirement fund,

and $17.34 to FEGLI premiums. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Albert Wolfus, and against defendant, in the total amount of $5,584.20, with the provision that the sum of $285.68 be paid to plaintiff's Civil Service Retirement fund, and $34.68 is to be paid to plaintiff's FEGLI fund. A net payment is to be made to plaintiff, Albert Wolfus, in the amount of $5,263.84 for back salary entitlement to July 1, 1978, and retirement benefits through May 30, 1980

APPENDIX C

In the United States Court of Claims

No. 26-76

FILED SEP 28 1979

JOSEPH J. CLARK, ET AL.

v.

THE UNITED STATES

Before KUNZIG, *Judge*, Presiding, BENNETT and SMITH, *Judges*.

ORDER

This case comes before the court on defendant's motion, filed June 19, 1979, for rehearing *en banc* pursuant to Rules 7(d) and 151, with reference to the decision entered herein on May 16, 1979. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied,

and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151,

IT IS ORDERED that defendant's said motion for rehearing is denied.

BY THE COURT

/s/ _____
ROBERT L. KUNZIG
Judge, Presiding

APPENDIX D

1. 5 U.S.C. 5102 provides in pertinent part:

(a) For the purpose of this chapter—

* * * * *

(5) "grade" includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to—

(A) level of difficulty and responsibility; and

(B) level of qualification requirements of the work;

to warrant their inclusion within one range of rates of basic pay in the General Schedule.

* * * * *

(c) This chapter does not apply to —

* * * * *

(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement, and employees in the Bureau of Engraving and Printing whose duties are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations * * *

2. 5 U.S.C. (& Supp. III) 5331 provides:

> (a) For the purpose of this subchapter, "agency", "employee", "position", "class", and "grade" have the meanings given them by section 5102 of this title.
>
> (b) This subchapter applies to employees and positions, other than Senior Executive Service positions, to which chapter 51 of this title applies.

3. 5 U.S.C. (& Supp. III) 5334 provides in pertinent part:

> (a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management in conformity with this subchapter and chapter 51 of this title when—
>
> > (1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
> >
> > (2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;
> >
> > (3) he is demoted to a position in a lower grade;
> >
> > (4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;
> >
> > (5) his type of appointment is changed;
> >
> > (6) his employment status is otherwise changed; or
> >
> > (7) his position is changed from one grade to another grade.
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(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, he is entitled to—

(1) the maximum rate of the higher grade; or

(2) his existing rate of basic pay, if that rate is the higher.

If an employee so promoted or transferred is receiving basic pay at a rate saved to him under subchapter VI of this chapter on reduction in grade, he is entitled to—

(A) basic pay at a rate two steps above the rate which he would be receiving if subchapter VI of this chapter were not applicable to him; or

(B) his existing rate of basic pay, if that rate is the higher.

4. 5 C.F.R. 531.201 provides:

This subpart and sections 5333 and 5334 of title 5, United States Code, apply in fixing and adjusting rates of basic pay of each employee subject to the General Schedule.

5. 5 C.F.R. 531.202(h) provides:

"Promotion" means a change of an employee, while continuously employed, from:

(1) One General Schedule grade to a higher General Schedule grade; or

(2) A lower rate paid under authority other than subchapter III of chapter 53 of title 5, United States Code, to a higher rate within a General Schedule grade.

6. 5 C.F.R. 531.203(c) provides:

Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate. When an employee's type of appointment is changed in the same position, the agency may continue to pay the employee at his or her existing rate or may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's previous rate falls between two rates of the grade, the agency may pay him or her at the higher rate.

7. 5 C.F.R. 531.204(a)(1) provides:

The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

8. Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1, Subchapter S8-2a(7) (Apr. 14, 1980), provides

Promotion means a change of an employee, while continuously employed, from:

—One grade to a higher grade under the same type wage schedule, for example, from a grade 9 under the non-supervisory wage schedule to grade 10 under the non-supervisory wage schedule, whether in the same or different wage areas.

—A job or grade under a wage schedule to a job or grade with a higher representative rate under a different wage schedule.

—A job or grade paid under the General Schedule or other statutory pay schedule to a job or grade with higher representative rate under a wage schedule.

9. Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1, Subchapter S8-3c (Inst. 17 Apr. 14, 1980), provides:

Position or appointment change. Subject to S8-3d, and to pay retention provisions in subchapter S9, when an employee is reemployed, transferred, reassigned, promoted, or changed to lower grade, an agency may pay him/her at any rate of his/her grade which does not exceed his/her highest previous rate; however, if his/her highest previous rate falls between two rates of his/her grade, the agency may pay him/her at the higher rate. When an employee's type of appointment is changed in the same job, an agency may continue to pay him/her at his/her existing scheduled rate or may pay him/her at any higher rate of his/her grade which does not exceed his/her highest previous rate; however, if his/her highest previous rate falls between two rates of his/her grade, the agency may pay him/her at the higher rate.

10. At the time of the events leading to this litigation, Federal Personnel Manual System, *Federal*

Wage System, Supplement 532-1, Subchapter S8-3d (Inst. 8 Jan. 16, 1973), provided:

> **Promotion.** Upon promotion an employee is entitled to be paid at the lowest scheduled rate of the grade which exceeds his existing rate of pay by no less than one step-rate increment of the grade from which he is promoted. An employee promoted from a single rate job under a special schedule to a multistep-rate job under the regular schedule is paid at the lowest scheduled rate of the new grade which exceeds his existing rate by no less than four percent. If, for any employee so promoted, there is no rate in the higher grade which is at least one step-increase (four percent) above his existing rate of pay he shall receive (1) the maximum scheduled rate of the higher grade or (2) his existing rate of pay, if the existing rate of pay is the higher. (This rule is not applicable to actions involving changes of employees between positions paying single rates.)

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